

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWAN D. GREEN,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 194111

Recorder's Court

LC No. 94-003221

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to six to fifteen years' imprisonment for the assault conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right, and we affirm.

On appeal, defendant argues that the trial court abused its discretion in binding over defendant on charges of assault with intent to rob while armed and felony-firearm. We disagree. We review a district court's decision to bind over a defendant for an abuse of discretion. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991); *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). In order to bind over a defendant for trial, there must be evidence amounting to probable cause to believe that a felony has been committed. *People v Cotton*, 191 Mich App 377, 384; 478 NW2d 681 (1991). Guilt beyond a reasonable doubt need not be established, but there must exist evidence of each element of the crime charged or evidence from which the elements may be inferred. *Id.*

Here, defendant was charged with assault with intent to rob while armed and felony-firearm. The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. *Cotton, supra*, 191 Mich App 391. Conviction of felony-firearm requires proof that the defendant possessed or carried a firearm during the commission or attempt to commit a felony. *People v Passeno*, 195 Mich App 91, 97; 489 NW2d

152 (1992). In this case, the evidence adduced at the preliminary examination established that defendant and his codefendant approached the complainant while she was pumping fuel at a gas station. Defendant pointed a gun at the complainant and ordered her to “[g]et the f--- away from the car,” while his codefendant opened the driver’s side door of the vehicle. Defendant and his codefendant then fled down a nearby alley. Because defendant held the complainant at gunpoint while the codefendant entered her vehicle, a reasonable inference can be drawn that defendant possessed the requisite intent to steal when he assaulted complainant. Moreover, in light of the complainant’s testimony that defendant wielded a gun during the incident, the elements of felony-firearm were also established. There was sufficient evidence to bind over defendant and, therefore, the district court did not abuse its discretion.

Defendant also argues that there was insufficient evidence to sustain his convictions. We disagree. When considering a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 525; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

At trial, the complainant testified that defendant and his codefendant approached her while she was pumping fuel into a container inside the trunk of her vehicle. According to the complainant, defendant pointed a gun at her and held her at bay, while the codefendant attempted to enter her vehicle. When the complainant escaped, she gave a description of her assailants to a group of security guards. The guards apprehended two men who matched the description given by the complainant and subsequently recovered a loaded gun from under a trailer behind the gas station. This was sufficient to sustain defendant’s convictions of assault with intent to rob while armed and felony-firearm.

Defendant next argues that he was denied a fair trial by the prosecutor’s examination of complainant and by the prosecutor’s comments during rebuttal closing argument. We disagree. We review a prosecutor’s allegedly improper conduct in context to determine whether it denied defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

First, defendant contends that, during her rebuttal closing argument, the prosecutor made improper references to defendant’s absence from trial. Because the comment with which defendant takes issue essentially mirrors an instruction subsequently issued by the trial judge, defendant’s claim on this ground is without merit. Second, defendant contends that the prosecutor impermissibly led the complainant’s testimony at the preliminary examination by steering her to withdraw her initial in-court identification of the codefendant as being the perpetrator in possession of the gun in favor of her subsequent identification of defendant as being the one in possession of the gun. However, our examination of the record reveals no evidence of leading or prompting by the prosecutor. Rather, the prosecutor, in an attempt to clarify complainant’s testimony, asked complainant to physically indicate which of the two defendants was in possession of the gun. The prosecutor could not have anticipated, much less suggested, complainant’s verbal response in which she inculpated defendant. Because there is no evidence to support defendant’s assertion, defendant’s claim on this ground is also without merit.

Defendant next argues that the trial court abused its discretion by denying defense counsel’s request for a continuance. We disagree. We review a denial of a continuance for an abuse of

discretion. *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In determining whether a trial court has abused its discretion in denying a defendant's request for a continuance, this Court must consider whether: (1) the defendant was asserting a constitutional right; (2) the defendant had a legitimate reason for asserting that right; (3) the defendant was not negligent in asserting it; (4) prior adjournments of trial were not at the defendant's request; and (5) on appeal, the defendant has demonstrated prejudice resulting from the trial court's abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

In this case, defendant was asserting a constitutional right, the right to be present during trial. *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). However, defendant waived his right to be present by voluntarily absenting himself from trial. *Id.* Because there is no evidence to the contrary, the trial court did not abuse its discretion in denying defense counsel's request for a continuance and proceeding with the trial to conclusion.

Defendant also raises several issues related to sentencing. First, defendant argues that the sentence for his assault conviction was disproportionate. We disagree. We review a claim that a sentence is disproportionate for an abuse of discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). A sentencing court has abused its discretion when a sentence is not proportionate "to the seriousness of the circumstances surrounding the offense and the offender." *Id.*, citing *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant contends that the sentence for his assault conviction was disproportionate because of defendant's post-conviction cooperation with police, his age and lack of criminal history, and the inseverity of the criminal episode. Defendant's six-year minimum sentence for his assault conviction fell within the recommended guidelines' range of two to six years and, therefore, is presumptively proportionate. *People v McElhaney*, 215 Mich App 269, 285-286; 545 NW2d 18 (1996). Because the factors presented by defendant at sentencing were not sufficiently unusual to overcome the presumption of proportionality, we find no abuse of discretion. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Second, defendant argues that he is entitled to resentencing because the trial court failed to sufficiently articulate on the record its reasons for departing from the recommended guidelines' range. We disagree. Contrary to defendant's assertion, the sentencing judge did not depart from the guidelines. Moreover, the sentencing judge satisfied the articulation requirement by acknowledging that he was sentencing defendant in accordance with the guidelines. *People v Bailey*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996). Thus, we find no error.

Third, defendant argues that he is entitled to resentencing because the sentencing judge erred in calculating the variables on the sentencing guidelines. The Michigan Supreme Court has recently ruled in *People v Mitchell*, 454 Mich 145; ___ NW2d ___ (1997), that a claim of miscalculated variable is not in itself a claim of legal error as the guidelines do not have the force of law. The *Mitchell* Court stated:

On postsentence review, guidelines departure is relevant solely for its bearing on the *Milbourn* claim that the sentence is disproportionate. Thus, application of the guidelines

states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. [*Id.*, p 177. Emphasis added.]

Since we have concluded that defendant's sentence is proportionate, this Court is precluded from appellate review on the issues of variable scoring. See *People v Bass*, ___ Mich App ___; ___ NW2d ___ (Docket No. 178342, issued 4/25/97), slip op p 10.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Barbara B. MacKenzie

/s/ William B. Murphy